



## Under Trump, Agency Rulemaking Grinds to a Halt

Cheryl Bolen

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Agency rulemaking has essentially ground to a halt under the Trump administration and the president's executive order on controlling regulatory costs could result in near gridlock for the next four years, panelists at an American Bar Association conference said.

Whether the significant slowing of the administrative state is a feared or a welcome development depends on your point of view, said several speakers at the ABA's 13th annual Administrative Law and Regulatory Practice Institute.

Since President Donald Trump was sworn into office Jan. 20, just 39 rules have been submitted for review to the Office of Information and Regulatory Affairs (OIRA), the agency that reviews all significant federal regulations. There are currently 16 pending agency actions.

By comparison, the administration of former President Barack Obama had submitted 118 rules by the same point in the president's first year, according to the RegInfo.gov database.

### Slow to Thaw

Agencies have been slow to regulate in part because of a regulatory freeze that was put in place on Trump's first day in office. But panelists also pointed to the executive order signed in January that requires agencies to take two deregulatory actions and find offsets for every one rule it wants to promulgate.

To date, no regulation has been submitted that has required deregulatory actions and offsets. OIRA issued guidance in April that contains exemptions and definitions of what constitutes a regulation that must adhere to the requirements of the executive order.

But Amanda Leiter, professor of law at the American University Washington College of Law, suspected that few agencies—but particularly the Environmental Protection Agency—will be inclined to regulate at all. Leiter previously served at the Department of the Interior as deputy assistant secretary for land and minerals management.

The administration is choosing to deregulate with a particularly blunt-force tool, and it has not thought through how the cost offsetting will work, Leiter said.

## **Not a Two-for-One Trade at All**

In particular, many environmental rules have high up-front costs, such as an expensive scrubber on a coal-fired power plant to remove air pollution, while their benefits are spread out over decades, Leiter said.

But the OIRA guidance suggests that to offset a new rule, agencies are supposed to look only at the future costs of existing rules, Leiter said. What that does is take a rule at the point where its benefits are highest, but rather than count that, the agency can only look at the costs, which are quite low because the rule has already been implemented, she said.

What this means is that many more than two existing rules will be needed to offset any new rule, which is likely to have a high up-front cost, Leiter said.

“And that’s why, in my view, the two-for-one executive order really is not meant as a two-for-one trade at all, but instead just as putting the brakes on new regulations,” she said.

It will be so onerous to issue any regulation for any agency that “honestly they’re not going to bother,” at least among environmental agencies, Leiter said.

## **At Least It’s Honest**

Andrew Grossman, partner at Baker & Hostetler LLP and adjunct scholar at the Cato Institute, agreed that the executive order raises an expressly deregulatory agenda and is a “stunningly blunt” tool.

“But that’s the point,” Grossman said. “Genteel regulatory review hasn’t really gotten us anywhere. So let’s just be clear about what it is that we’re trying to achieve. Less regulation.”

The one-in, two-out policy could be arbitrary and illogical in some respects, depending on how it’s implemented, Grossman said. “But it has the virtues of honesty and simplicity,” he said.

## **Future Predictions**

Moving forward, Grossman predicted more executive orders and OIRA guidance on agency regulation. “We should expect more top-down control,” he said.

This is particularly likely to be the case after Neomi Rao is confirmed as OIRA administrator, Grossman said. Based on her research and comments, and what this administration has done so far, there are a few predictions that can be made, he said.

One is a “reality-based” review of rules that is less deferential to agencies than in the past, Grossman said. Another is increased oversight of agencies, more control over independent regulatory agencies, and greater emphasis on the Paperwork Reduction Act, he said.

The Paperwork Reduction Act is one of the few statutory levers that OIRA possesses, and it is a powerful one if the agency chooses to wield it, Grossman said.

“Finally, I think we can certainly expect increased centralization of legal analysis and implementation,” he said.